

of fifteen years and multiples thereof up to ninety years, or for a term of ninety-nine years renewable forever, subject to the approval of the governor and attorney general, and the annual rental therefore shall be six per cent of the appraised value thereof, as determined by said superintendent of public works."

Inasmuch as more than the two years have elapsed since the effective date of this act, I assume that the canal lands here in question have not been designated for highway purposes and that no application has been made by the City of Troy or by any other political subdivision for the lease of these lands or any part thereof for park purposes. With this assumption, it clearly appears that you are authorized to execute this lease under the section of the DeArmond Act above quoted.

Upon examination of the lease, I find that the same has been properly executed by you and by the Gummed Products Company, the lessee therein named, by the hand of the vice-president of said company pursuant to authority conferred upon said officer for the purpose by a resolution of the board of directors of the company passed November 28, 1934. I further find, upon examination of the provisions of the lease and of the conditions and restrictions therein contained, that the same are in conformity with the provisions of the act of the 89th General Assembly, above referred to, and with the provisions of other statutory enactments relating to leases of this kind. I am accordingly approving this lease as to legality and form, as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof, all of which are herewith returned.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3607.

OLD AGE PENSION LAW—"TRUST DEED" IS MORTGAGE AND SHOULD BE RECORDED IN RECORD OF MORTGAGES BY COUNTY RECORDER.

SYLLABUS:

1. *It is the duty of a county recorder to record in the proper record upon presentation therefor, an instrument denominated a "trust deed", which purports to convey to the Division of Aid for the Aged, in the Department of Public Welfare of the State of Ohio, certain real estate or an interest therein, in trust, for the uses and purposes therein mentioned, and given in pursuance of Section 1359-6, General Code, by applicants for aid under the Old Age Pension Law, without its first having been presented to the county auditor and endorsed by him: "transferred" or "transfer not necessary." Inasmuch as such an instrument is not a deed of absolute conveyance of real estate or a conveyance of minerals or mineral rights, its recordation is not controlled by the terms of Section 2768, General Code.*

2. *The instrument described in Paragraph 1, of this syllabus, is not such a conveyance as will authorize a county auditor on application and presentation thereof, to transfer the land described therein, on the tax list, from the name in which*

it stands to the name of the grantee named in the instrument, as provided in Section 2573, General Code.

3. *Under a so-called "trust deed" given by an applicant for aid for the aged, who is the owner of real estate or an interest therein, to the Division of Aid for the Aged, in the Department of Public Welfare of the State of Ohio, in pursuance of Section 1359-6, General Code, a vested interest in the real estate therein described, remains in the grantor, and such instrument, as to rights of third persons, is a mortgage, and is required to be recorded as such. National Bank of Columbus vs. Tennessee Iron & R. Company, 62 O. S., 564.*

COLUMBUS, OHIO, December 10, 1934.

HON. M. L. BROWN, *Chief, Division of Aid for the Aged, State Office Building, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"Will you please furnish this Division with a written legal opinion on the following subject:

Is it legally necessary to have the title to real property, conveyed to this Division, transferred on the books of the County Auditor as a prerequisite to having trust deeds recorded in the County Recorder's office?

The County Recorders, in a few of the larger counties, are refusing to record trust deeds executed to this Division unless they have been previously transferred to us by the County Auditor."

As a condition precedent to the extension of Aid to the Aged, under what is commonly termed the "Old Age Pension Law" (Secs. 1351-1 et seq., General Code), the applicant for such aid who is the owner of an interest in real property, is required to convey and transfer the said property to the Division of Aid for the Aged in the Department of Public Welfare of the State of Ohio, in trust, subject to permission to the recipient of such aid and his or her spouse, to use or reside upon the property for life; and upon the death of either, leaving wife or husband who is entitled to aid, the survivor likewise to be permitted to use or reside upon the said property for life. This requirement is made by favor of Section 1359-6, General Code, which reads as follows:

"If an applicant for or recipient of aid, or his or her spouse, is the owner of any interest in real or personal property, excepting household goods, clothing and other personal effects, it may be required, as a condition precedent to the payment of aid or further aid, that he convey and transfer such property to the Division of Aid for the Aged (hereinafter created), in trust, subject to permission to the recipient of aid and his or her spouse to use or reside upon such property for life; and upon death of either, leaving wife or husband who is entitled to aid, the survivor likewise be permitted to use or reside upon the said property for life; provided, however, that in all such cases such property shall be deemed to produce income as provided in Section 5 (G. C. §1359-5) hereof, and the aid granted shall be reduced accordingly, all taxes and assessments on such property and all necessary expenses of keeping it in good condition and repair shall be paid by the persons using or residing upon it.

All property conveyed to the Division in trust, upon the death of the person or persons entitled to use or reside upon such property as above provided, shall be sold by the Division at public sale, and the proceeds applied in the following order; first, the costs of sale; second, all valid taxes and assessments which are a lien upon said property; third, repay to the Treasurer of State all amounts paid under this act to the person who conveyed or transferred the property to the Division, and all such amounts paid to his or her spouse, with interest at four per centum per annum; fourth, all other valid debts in order according to law; and the balance, if any, to be distributed to the heirs or other persons by law entitled thereto.

Provided, however, that upon request of a recipient of aid, or, after his death, of his surviving spouse, an heir, or other person lawfully entitled thereto, and when reimbursed to the full amount of aid paid and interest as aforesaid, the Division shall reconvey or transfer the property to said person, surviving spouse, or/and heirs or other persons lawfully entitled thereto."

The instrument of conveyance which the Division of Aid for the Aged requires, and which is given by every applicant for aid who owns real property or an interest therein, is denominated a "trust deed." This instrument expressly recites that the grantors thereunder, in consideration of the money to be paid to the said grantors as recipients of aid for the aged, as provided by Sections 1359, et seq. of the General Code of Ohio, do thereby grant, bargain, sell and convey to the said Division of Aid for the Aged in the Department of Public Welfare of the State of Ohio, "as Trustee, its assigns and successors in trust, forever" certain real estate therein described, "to have and to hold said premises, with all the privileges and appurtenances thereunto belonging, to the said the Division of Aid for the Aged, as Trustee, its assigns and successors in trust, forever, but for the uses and purposes and upon the trusts set forth in a certain agreement of trust made and entered into by the parties hereto on the day of, 19....."

Then follows the usual clause releasing dower, and a clause wherein the grantor asserts that he is lawfully seized of the premises granted and that the same are free and clear of encumbrances except such as are enumerated. The instrument is executed, witnessed and acknowledged in the manner provided by law for the acknowledgment of deeds.

The "agreement of trust" which is expressly referred to in the trust deed, is an instrument which the grantors are required to execute contemporaneously with the execution of the trust deed, as a condition precedent to the receipt of aid through the Division of Aid for the Aged, as provided by the Old Age Pension Law.

This "agreement of trust" or "trust agreement" so denominated, is an agreement between the Division of Aid for the Aged in the Department of Public Welfare of the State of Ohio, and the applicant for aid under the Old Age Pension Law denominated in said instrument for convenience, as trustee and trustor respectively, whereby it is expressly agreed, after reciting the fact of application for aid by the trustor and the terms of Section 1359-6, General Code, which are set out in full in the said agreement, as follows: (material parts only, of said agreement are herein set forth)

"Now, Therefore, the parties hereto, in consideration of the premi-

ises and each acting in consideration of the premises and agreements of the other herein set forth and as provided by law, have agreed and hereby agree as follows:

1. The Trustor will simultaneously with the execution of this agreement convey and deliver to the Trustee the following described property, to-wit: (here follows a description of the property)

2. Contemporaneously with the execution of this agreement, the Trustor will execute and deliver a quit claim deed of conveyance, conveying to the Trustee the real estate hereinabove described, in trust for the use, benefits and purposes set forth in the law granting aid to the aged (Section 1359, et seq., General Code of Ohio).

3. All of the aforesaid property as conveyed to the Trustee shall be held, controlled and disposed of by said Trustee upon the trusts and for the use and purposes provided by law authorizing the granting of aid to aged persons and upon the terms and conditions therein provided and as herein set forth.

4. The Trustee is hereby given and shall have full power to sell all or any part of said property on the death of the Trustor, providing his or her spouse is not entitled to aid and the Trustee for such purpose may execute and deliver deeds and other instruments of conveyance or transfer.

The Trustee shall not be held to have assumed and does not assume any responsibility as to the validity of any title conveyed by the Trustee or held by it, and all conveyances that may be executed and delivered by the Trustee shall be without covenant of warranty.

In no event shall the Trustee be held liable for any neglect, omission or wrongdoing by it or its agents or employes or for any loss or damage for whatsoever cause or however caused.

Trustee by this agreement shall not be deemed and does not assume any responsibility for the payment of any debt for which the aforesaid property or any part thereof may be held as security or collateral. Trustee does not assume the payment of any claim held against the Trustor which is or may be a lien upon the aforesaid property.

This agreement may be terminated by the Trustor upon the Trustee being reimbursed to the full amount of aid paid to the Trustor as the recipient of aid for the aged, and interest."

The above instrument is executed in duplicate, signed by the parties thereto and witnessed and acknowledged as is provided by law for the execution of deeds.

As pertinent to your immediate inquiry, consideration should be given to the provisions of Sections 2573, 2757, 2759, 2768 and 8543 of the General Code of Ohio. Sections 2573, 2759 and 8543 read as follows:

"Sec. 2573. On application and presentation of title, with the affidavits required by law, or the proper order of a court, the county auditor shall transfer any land or town lot or part thereof or minerals therein or mineral rights thereto, charged with taxes on the tax list from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent or otherwise. If by reason of the conveyance or otherwise, a part only of a tract

or lot, or minerals therein or mineral rights thereto, as charged in the tax list is to be transferred, the person desiring the transfer shall make satisfactory proof of the value of such part compared with the value of the whole, as charged on the tax list, before the transfer is made. The auditor shall indorse on the deed or other evidences of title presented to him that the proper transfer of the real estate therein described has been made in his office or that it is not entered for taxation, and sign his name thereto."

"Sec. 2759. The county recorder shall record in the proper record in a fair and legible handwriting, typewriting, or printing, all deeds, mortgages, or other instruments of writing required by law to be recorded, presented to him for that purpose. They shall be recorded in regular succession according to the priority of presentation, entering the file number at the beginning of such record. At the foot of the record of each instrument he shall record the date and precise time of day when it was presented for record."

"Sec. 8543. All other deeds and instruments of writing for the conveyance or incumbrance of lands, tenements, or hereditaments, executed agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the premises are situated, and until so recorded or filed for record, they shall be deemed fraudulent, so far as relates to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of such former deed or instrument."

Sections 2757 and 2768, General Code, read in part, as follows:

"Sec. 2757. The recorder shall keep four separate sets of records, namely: First, a record of deeds, in which shall be recorded all deeds, powers of attorney, and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments; Second, a record of mortgages, in which shall be recorded all mortgages, powers of attorney, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or incumbered in law;
* *"

"Sec. 2768. The county recorder shall not record any deed of absolute conveyance of land or any conveyance, absolute or otherwise, of minerals or mineral rights until it has been presented to the county auditor, and by him indorsed 'transferred', or 'transfer not necessary.'
* *"

Assuming for the moment that the so-called "trust deed" in question, should be recorded in the record of deeds kept by the county recorder as provided by Section 2759 and Section 8536, General Code, it seems clear that it should be so recorded without the necessity of its having first been presented to the county auditor and marked or endorsed by him as having been "transferred" or "transfer not necessary." It is only when a deed is for the absolute conveyance of land or a conveyance absolute or otherwise, of minerals or mineral rights that the recorder is prohibited from recording it by the terms of Section 2768, General Code, until it has been endorsed by the auditor as having been "transferred" or

"transfer not necessary." Clearly, this deed is not an absolute conveyance of land. It expressly refers to the statute which authorizes its existence and to the trust agreement executed contemporaneously with it. Its proper construction and legal effect must be judged by construing its terms and those of the statute and the contemporaneous trust agreement together. The provisions of the statute and the collateral trust agreement referred to in the so-called deed are as effectively made a part thereof, in my opinion, as though they had been expressly written therein. The instrument on its face purports to be no more than a conveyance to the grantee in trust for the uses and purposes and upon the trusts set forth in the agreement of trust contemporaneously entered into. By the terms of this trust agreement, the grantor retains possession of the premises granted and is entitled to the use thereof. He remains obligated to pay the taxes on said property and to pay all necessary expenses of keeping the property in good condition and repair, and he and his surviving spouse or heirs are entitled to a re-conveyance of the property upon the repayment to the Division of Aid for the Aged of all aid which had been paid to him or his surviving spouse for which aid the conveyance was given to secure.

Moreover, the power of sale given to the grantee under the said instrument is inconsistent with the making of an absolute conveyance of lands. In the case of *National Bank of Columbus vs. Tennessee Coal, Iron & R. Co.*, 62 O. S., 564, where a similar instrument conveying property in trust to secure the payment of a note, with a power of sale in the grantee, was under consideration, the court said on page 587:

"The power of sale instead of showing the instrument to be a deed passing title to the grantee, has the contrary effect, and aids in showing the instrument to be a mortgage, as no such power of sale is necessary in a deed which passes title, because the deed by its own vigor, carries with it a power of sale to the grantee while a mortgage does not carry such power unless expressly granted therein. The power of sale in this instrument is in the nature of a power of attorney to sell and convey lands, in which case the legal title remains in the grantor until the power is executed."

The manifest purpose of transferring property on the tax duplicate as provided by Section 2573, General Code, is so that the record will show who is responsible for the payment of the taxes and to whom receipts for payment of taxes when paid, should be given. In the instant case the grantor under the instrument in question, is the one who is responsible for the payment of the taxes, and the auditor's duplicate should show that fact. It is not necessary, however, that the auditor endorse the instrument "transfer not necessary", as a prerequisite of its being entitled to record, as it is not, in my opinion, an absolute conveyance of land or a conveyance of minerals or mineral rights, as those terms are used in Section 2768, General Code.

This brings us to the question of where the so-called "trust deed" should be recorded. The importance of this question is at once apparent when it is recalled that under the decisions of our courts, the recording of an instrument not entitled to record, is not constructive notice either of its existence or of its contents. *Amick vs. Woodworth*, 58 O. S., 86; *Longmede vs. Weaver*, 65 O. S., 17; *Peoples Building & Loan Company vs. McIntre*, 14 O. App., 28; *Stanton vs. Schmidt*, 45 O. App., 203.

There is a well recognized distinction between an absolute deed of trust and

a deed of trust in the nature of a mortgage. A deed of trust is an unconditional conveyance to a trustee for the purpose of raising a fund to pay debts. *Woodruff vs. Robb*, 19 O., 212; *Hoffman vs. Mackall*, 5 O. S., 124. It passes legal title upon its delivery. *Moore vs. Bennett*, 11 O. S., 94. In 27 O. Jur., 260, it is said:

"A deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. (*Woodruff vs. Robb*, 19 O., 212; *Martin vs. Alter*, 42 O. S., 94). The same rules apply to such an instrument as apply to a mortgage, so far as the location of the legal title is concerned. Where a vested interest remains in the grantor, in a deed with a trust clause, such deed, as to the rights of third persons, is a mortgage. (*National Bank vs. Tennessee Coal, Iron & R. Co.*, 62 O. S., 564). A trust deed is said to be in the nature of a mortgage when it is given as a security for money loaned, even though it provides for a reconveyance upon payment. (*Babcock vs. Camp*, 12 O. S., 11). The legal title retained by the mortgagor may be encumbered by subsequent mortgages, (*Ritinger vs. Northrop*, 10 O. Dec. Rep. 35)."

In the case of *National Bank vs. Tennessee Coal, Iron and R. Co.*, *supra*, there was under consideration an instrument containing elements almost precisely the same as those involved in the trust deed here under consideration. In that case the question arose as between the grantor under the said instrument and a judgment creditor whose judgment lien attached, if at all, prior to the recording of the instrument in question in the record of mortgages. The instrument in question was in the form of a deed given by one Alexander C. Patton to the National Bank of Columbus, as trustee to secure a debt of the grantor, with a defeasance clause in case the debt was paid, and contained a power of attorney to the grantee to sell the property in case of default and pay the balance of the proceeds of the sale after satisfying the debt to the grantor. It also contained a provision to the effect that if the debt which it was given to secure, was paid, the grantee under the instrument should re-convey the property by quit claim deed to the grantor, his heirs or assigns forever. It was held that the grantor under the instrument retained a vested interest in the property. In the first branch of the syllabus it is said:

"That said instrument is in legal effect a mortgage, and did not take effect, as to third parties, until delivered for record; that said judgment became a lien on said real estate from the first day of the term of court at which it was rendered, and said day being prior in time to the date of the delivery of the mortgage for record, the judgment was the prior lien."

The second branch of the syllabus of the above case is as follows:

"Where a vested interest remains in the grantor in a deed with a trust clause, such deed, as to the rights of third persons, is a mortgage, and is required to be recorded as such."

In the course of the opinion the court said:

"Manifestly the interest which Mr. Patton retained in the surplus

of the value of the real estate over and above the amount required to pay his note, and which was to be returned to him by the terms of the instrument, was a vested interest, and therefore subject to levy and sale to pay his debts. * * * *

Let us next inquire what vested interest he then had in the lands upon which a lien could attach in favor of the judgment creditor, and against Mr. Patton and his grantee, the bank.

Section 4106, Revised Statutes (now Section 8510, General Code), provides how 'A deed, mortgage, or lease of any estate or interest in real property' shall be executed. The instrument in question was either a deed or mortgage. It was not a lease. The plaintiff in error claims that it was in legal effect a deed, while the defendant in error claims that it was in legal effect a mortgage. The statute does not define either a deed or a mortgage, but seems to take it for granted that those terms are well understood and need no definition. It must be clear that this instrument is not simply a deed, as that word is usually understood, because a deed conveys full title for a certain consideration without any interest remaining in the grantor in the realty conveyed. True, there may be conveyances by deed upon conditions, but in all such cases the grantor retains no vested interest in the estate or interest conveyed and if it ever returns to him, it returns upon breach of a condition, and in such cases his interest is contingent and not vested. A conveyance may also be made by deed in trust for the benefit of creditors, and in such cases the title passes under the deed to the trustee, even though the surplus, if any, after payment of all debts, comes back to the grantor. But even in such cases it is usually regarded safer to make the grantor a party to the proceedings to sell the real estate conveyed by the deed of assignment.

While the instrument in question is not a straight, ordinary deed, it is claimed to be what is known as a trust deed, or deed in trust conveying the title to the bank, and out of Mr. Patton, so as to be good against the world without record, except as against a subsequent bona fide purchaser without notice.

The question whether this instrument is a deed in legal effect as claimed, or a mortgage, is not without difficulty. The granting clause is that of an absolute deed of conveyance, and so is the habendum down to the word 'forever;' and then, after a semicolon, comes the following: (Here follows a copy of a portion of the deed).

* * * * *

Everything contained in this trust part of the instrument is inconsistent with, and irreconcilably opposed to, a deed passing title from Mr. Patton to the bank. He retains possession of the premises until the bank shall require and make a sale of the property. The conveyance is made for the purpose of *securing* to the bank \$25,000 evidenced by a past-due note. If not paid within five years the bank may sell the real estate after six months notice, and apply the proceeds upon the note, and pay the surplus, if any, to Mr. Patton. No extension shall be made, and if Mr. Patton shall pay the debt at any time, the deed shall be null and void, and the bank shall execute a quit-claim deed to Mr. Patton, his heirs and assigns forever.

If the instrument had been intended to pass title and not operate

merely as a security, the bank would have taken immediate possession of the premises; it would not have stated that the conveyance was for the purpose of *security*; it would not have provided for a power of sale, because a grantee in an absolute deed may sell when and as he pleases; it would not have agreed to pay any surplus to Mr. Patton; it would not have agreed that upon payment of the debt the deed should be null and void; and it would not have agreed to make a quit-claim deed.

* * * * *

Much stress is laid by plaintiff in error upon the promise in the instrument in question, upon payment of the debt, to make a quit-claim deed, and it is urged that that provision shows that the title passed. We do not so construe it. The instrument was evidently intended to serve as a mortgage security to the bank, but to be so far in the form of a deed as to permit its record in the record of deeds instead of mortgages, and it was so recorded. Under these circumstances, upon payment of the debt by Mr. Patton, the instrument, even though made null and void by such payment, could not be released as a mortgage upon the margin of the deed record, without leaving a blur upon the title, and therefore for the protection of the title in case of payment, the provision for a quit-claim deed was very properly inserted. But that provision did not make the instrument a deed, but was a strong confirmation of its being a mortgage, because it showed that the grantor still had a vested interest in the property, the title to which he was careful to protect. The intention was to secure the bank and shield Mr. Patton. That intention failed of its purpose, as is often the case, when the rights of third parties intervene. In such cases courts disregard mere forms, and consider the substance and legal effect of the transaction."

In view of the decision of the court in the above case, which involved the proper construction of an instrument almost precisely like the trust deed here under consideration, I am of the opinion that the said "trust deed" is a mortgage rather than a deed, and that the grantor therein retains a vested interest in the property which the deed purports to convey and that the said deed should be recorded in the record of mortgages.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

3608.

DISAPPROVAL, LEASE TO CANAL LAND IN VILLAGE OF NEWCOMERSTOWN, TUSCARAWAS COUNTY, OHIO, FOR THE RIGHT TO OCCUPY AND USE FOR RESIDENCE AND LAWN PURPOSES—FIRST NATIONAL BANK.

COLUMBUS, OHIO, December 10, 1934.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You recently submitted for my examination and approval a canal